Government of the State of Sarawak v Lah Anyie & Ors (on behalf of themselves and all other occupiers, holders and claimants of native customary land at Tanjong Tuan and Sungai Menggatal, Long Teran Kanan, Tinjar, Baram, Miri Division, Sarawak)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–254 OF 2010
ABDUL WAHAB PATAIL, TENGKU MAIMUN AND HAMID SULTAN JJCA
1 APRIL 2013

Native Law and Custom — Land dispute — Customary rights over land — Declaration to assert native customary rights — Appeal — Whether native customary rights could subsist in land under NCR upon becoming part of protected forest or reserved land — Whether it was just and unconscionable of trial judge to rely upon protected forest and provisions of Forests Ordinance 1934 to defeat claim — Forests Ordinance 1934 s 33 — Forest Ordinance 1953 s 36

In the three appeals before the court, the respondents ('the plaintiffs'), who belonged to the Kayan/Kenyah communities sought declarations to assert their native customary rights ('NCR') claims against the defendants. It was alleged that in 1964, the plaintiffs acquired the NCR over a land which was permitted by the Berawan community to settle in the area. The District Officer, Baram gave tacit approval for the plaintiffs to occupy via a letter. Based on the said letter of approval, the plaintiffs relied on the doctrine of legitimate expectation. The learned trial judge found in favour of the plaintiffs' claim. Hence, the present appeal. In the present appeal, the issues that arose were whether the land claimed by the plaintiffs under NCR was indeed native customary land; whether native customary rights could subsist in the land claimed by the plaintiffs under NCR upon the said land becoming part of the protected forest or reserved land; and whether it was just and unconscionable of the trial judge to allow the plaintiffs to rely upon the protected forest and the provisions of the Forests Ordinance 1934 ('Ordinance 1934') to defeat the plaintiffs claim or to deny them the legitimate expectation that they would be allowed to live, occupy and cultivate the land.

Held, allowing the appeals with costs:

(1) There was such evidence that NCR in the claimed area subsisted before 1 January 1951. The prohibitions imposed by s 33 of the Ordinance 1934 and by s 36 of the Forest Ordinance 1953 ('Ordinance 1953') would have made it illegal for the Berawans and the plaintiffs to create

rights within the BTPF by clearing and land therein for farming or cutting timber or taking forest produce without a permit or authority from the conservator/director of forests. No such permit, license or authority had been adduced in evidence at the High Court. Therefore, any alleged right created would have been in contravention of the express provisions of the said Forest Ordinances and should not be enforced by declaratory orders from the court (see para 16(a)(b)(c)).

(2) There was no evidence of any Berawan custom which entitled that community would 'give' away their NCR land, assuming without admitting the Berawans had such alleged NCR, to another totally different community/communities. In any event, the very nature of native customary tenure over land required the natives to be in continuous occupation of their land and characterised their unique connection and attachment to their ancestral land (see para 16(f)(g)).

(3) The doctrine of legitimate expectation could not create a right when such right did not exist but might give some form of limited relief to the litigant if there was some unfairness or conduct which led the litigant to suffer inconvenience or damages (see para 21).

[Bahasa Malaysia summary

Di dalam tiga rayuan di hadapan mahkamah, responden-responden ('plaintif-plaintif'), yang berasal dari komuniti-komuniti Kayan/Kenyah memohon perisytiharan untuk mendesak tuntutan hak adat orang asal ('NCR') terhadap defendan-defendan. Adalah didakwa bahawa pada tahun 1964, plaintif-plaintif memperolehi NCR ke atas tanah yang dibenarkan oleh komuniti Berawan untuk menetap di kawasan tersebut. Pegawai Daerah, Baram memberi kelulusan tersirat untuk plaintif-plaintif menetap melalui surat. Berdasarkan surat kelulusan tersebut, plaintif-plaintif bergantung ke atas doktrin harapan yang sah. Hakim perbicaraan yang bijaksana memihak kepada tuntutan plaintif-plaintif. Dalam rayuan ini, isu yang berbangkit adalah sama ada tanah yang dituntut oleh plaintif-plaintif di bawah NCR adalah sememangnya tanah adat anak asal; sama ada hak adat anak asal boleh wujud dalam tanah yang dituntut oleh plaintif-plaintif di bawah NCR selepas tanah tersebut menjadi sebahagian hutan yang dilindungi atau tanah rizab; dan sama ada hakim perbicaraan adalah adil dan berat sebelah untuk membenarkan plaintif-plaintif bergantung ke atas hutan yang dilindungi dan peruntukan Ordinan Hutan 1934 ('Ordinan 1934') untuk mengagalkan tuntutan plaintif-plaintif atau untuk menafikan mereka dengan harapan yang sah bahawa mereka akan dibenarkan untuk tinggal, menghuni dan mengusahakan tanah.

Diputuskan, membenarkan rayuan-rayuan dengan kos:

(1) Terdapat keterangan bahawa NCR di dalam kawasan yang dituntut

wujud sebelum 1 Januari 1951. Larangan yang dikenakan oleh s 33 Ordinan 1934 dan oleh s 36 Ordinan Hutan 1953 ('Ordinan 1953') akan membuatkannya tidak sah untuk komuniti Berawan dan plaintif-plaintif untuk membentuk hak dalam BTPF dengan membersihkan dan tanah di dalam untuk bertani atau memotong kayu atau mengambil hasil hutan tanpa permit atau kuasa daripada pemulihara/pengarah hutan. Tiada permit sedemikian, lesen atau kuasa dikemukakan dalam keterangan di Mahkamah Tinggi. Oleh itu, apa-apa hak yang dibentuk didakwa akan bertentangan dengan peruntukan nyata Ordinan Hutan tersebut dan tidak patut dikuatkuasakan dengan perintah-perintah perisytiharan daripada mahkamah (lihat perenggan 16(a)(b)(c)).

(2) Tidak terdapat keterangan mengenai apa-apa adat Berawan yang memberikan hak kepada komuniti tersebut untuk 'give' tanah NCR mereka, menggangap tanpa mengaku komuniti Berawan mempunyai NCR yang didakwa tersebut, kepada komuniti lain yang berbeza sama sekali. Walau bagaimanapun, sifat pemegangan adat anak asal ke atas tanah memerlukan anak asal terus menetap di tanah mereka dan menyifatkan kaitan unik dan penggantungan mereka kepada tanah nenek moyang mereka (lihat perenggan 16(f)(g)).

(3) Doktrin harapan yang sah tidak dapat membentuk hak apabila hak sedemikian tidak wujud tetapi mungkin memberi beberapa bentuk relief terhad kepada litigan jika terdapat ketidakadilan atau tindakan yang menyebabkan litigan mengalami kesulitan atau kerosakan (lihat perenggan 21).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 682–711.

Cases referred to

Ara binte Aman & Ors v Superintendent of Lands & Mines, 2nd Division [1975] 1 MLJ 208 (refd)

Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 All ER 346, PC (refd)

Bisi Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors [2012] 3 MLJ 202; [2012] 1 LNS 260, CA (refd)

Bisi Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors [2008] 5 CLJ 606, HC (refd)

Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors [2008] 4 MLJ 309; [2008] 4 CLJ 538, CA (refd)

Ghaziabad Development Authority v Delhi Auto & General Finance Pvt Ltd [1994] 4 SCC 42, SC (refd)

Hamit bin Matusin & Ors v Superintendent of Lands and Surveys & Anor [1991] 2 CLJ 677 (refd)

Hamit bin Matusin v Superintendent of Lands & Surveys, Miri [2001] 3 MLJ 535; [2001] 6 CLJ 813, HC (refd)
JP Berthelesen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 233, SC (refd)
Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Unions & Ors [1990] 3 MLJ 231, HC (refd)
Madeli bin Salleh (suing as Administrator of the Estate of Salleh bin Kilong, deceased) v Superintendent of Lands & Surveys, Miri Division & Anor [2005] 5 MLJ 305, CA (refd)
North East Plantations Sdn Bhd v District Land Administrator & Anor [2010] MLJU 413; [2011] 2 CLJ 392, CA (refd)
R v Secretary of State for Transport ex parte Richmond upon Thames London BC [1994] 1 All ER 577, QBD (refd)
R v Secretary of State for the Home Department, ex parte Ruddock [1987] 2 All ER 518, QBD (refd)
Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149, CA (refd)
Sidek bin Haji Muhamad & 461 Ors v The Government of the State of Perak & Ors [1982] 1 MLJ 313; [1982] CLJ (Rep) 321, FC (refd)
Union of India v Hindustan Development Corp AIR 1994 SC 988, SC (refd)

Legislation referred to

Federal Constitution art 121
Forest Ordinance 1953 ss 33, 36
National Parks and Nature Reserves Ordinance 1998
Sarawak Land Code (Cap 81) ss 2, 5, 5(1), 5(2)(f), 10(c), 38, 44, 209(1), (2), (3)

Appeal from: Suit No 22–59 of 1997 (High Court, Miri)

JC Fong (Talat Mahmood bin Abdul Rashid and Lonie ak Pinda with him) (Jabatan Peguam Negeri, Kuching) for the appellant.
Harisson Ngau (Kalveet Sandhu with him) (Sandhu & Co) for the respondents.

Hamid Sultan JCA (delivering judgment of the court):

[1] Three appeals relating to native customary rights ('NCR') in Sarawak came for hearing on 4 February 2013 and on the same day we allowed the appeals. My learned brother Abdul Wahab bin Patail JCA and sister Tengku Maimun bt Tuan Mat JCA have read the draft judgment and approved the same.

[2] The respondents/plaintiffs' action was to seek declarations to assert their NCR claims against the defendants. The learned trial judge found in favour of the plaintiffs' claim. Each and every defendant has filed a separate appeal and is

represented by three firms of solicitor's and or advocates. For easy reference the parties will be referred to as the plaintiffs, the first, second and third defendant as per the suit.

[3] The third defendant, the Government of the State of Sarawak, has filed Appeal No Q-01–254 of 2010 and the second defendant has filled Appeal No Q-02–1373 of 2010 and the first defendant has filed Appeal No Q-02–1372 of 2010. All parties agree for the purpose of disposing all the three appeals, it will be sufficient to deal with the third defendant's appeal and the plaintiffs have filed one submission to cover all the three appeals substantially responding to the third defendant's submission.

[4] The learned state legal counsel Datuk JC Fong for the third defendant in this appeal says:

(a) the declaration that the respondents/plaintiffs have native customary rights over the claimed area ought to be set aside;

(b) the consequential declarations that the issuance of the provisional leases by the appellants infringed or impaired their NCR and violates the Federal Constitution should be set aside;

(c) the award of damages premised upon the respondents having lawfully created or acquired NCR over the claimed area and that there was no extinguishment of their purported NCR, be set aside;

(d) in lieu thereof, there should be an order that the claimed area was state land and that neither do the respondents have any, nor any legitimate expectation to be granted, proprietary interests over the claimed area, that the respondents were in unlawful occupation of state land under s 209(1) read with sub-s (2) of the Land Code; and

(e) alternatively, for the reasons mentioned in para 6.2 the court ought not to, grant the declarations sought by the respondents.

[5] At the outset we must say that as from 1 January 1958 NCR may be created as set out in s 5 of the Land Code of Sarawak ('LCS') 1957. The said s 5 reads as follows:

> 5. (1)As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in subsection (2), if a permit is obtained under section 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is State land any

person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.

(2) The methods by which native customary rights may be acquired are:

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine; or

(e) the use of land of any class for right or way; or

(f) any other lawful method:

Provided that:

(i) Until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until the document of tile is issued to him; and

(ii) The question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determine by law in force immediately prior to the 1st day of January, 1958.

[6] It is also well settled native customary rights cannot be transferred from one community to another unless the custom allows. And even within the same community transfer of NCR land is only permissible if allowed by the customs of the natives (see *Hamit bin Matusin & Ors v Superintendent of Lands and Surveys & Anor* [1991] 2 CLJ 677). In *Bisi Jinggot v Superintendent of Lands & Surveys Kuching Division & Ors* [2008] 5 CLJ 606, Hamid Sultan JC as he then was had this to say:

> *Madeli* was a case which was dealing with a native Malay who claimed NCR on the grounds that many years prior to 1 January 1958, his father and later himself, had acquired and exercised NCR over the disputed land by clearing the land, occupying the land and planting rubber and fruit trees on the land. In this case, the plaintiff is not alleging that his ancestors were in continuous occupation of the land. On the contrary he says that he has purchased the NCR by way of ordinary sale and purchase agreement. I do not think NCR can be transferred by modern conveyancing instrument of transfer as it could not have been prima facie part of the NCR and/or practice. I agree with the submissions of the first and second defendants that NCR in Sarawak can only be transferred in a limited sense for example by gift or inheritance etc, within the community members of the native before any claimant can be showered with the exclusive privileges. That is to say, inter alia, a native from a community residing in south of Sarawak cannot purchase NCR from a native in a community residing in north of Sarawak. The nexus must

be within the community and not within the race. For courts to recognise any such transfers it must be legislated. It is not sufficient for the plaintiff to allege such transfers are in vogue and is recognised in practice, without satisfactory evidence adduced in court. The burden of proof lies with the plaintiff and that burden has not been discharged in this case according to law.

[7] The above decision was upheld by the Court of Appeal and is reported as *Bisi Jinggot v Superintendent of Lands & Surveys Kuching Division & Ors* [2012] 3 MLJ 202; [2012] 1 LNS 260 which reads as follows:

From the above, it is clear to us that in the light of what had been decided by the Native Court, this court is legally bound to take judicial notice of the customary law that have been clearly and consistently established by the aforementioned judgment of the Native Court of Appeal in Sarawak with the bottom line that individual customary rights created or acquired by natives through the practice of their customs cannot be transferred for value or to someone from outside their community or district.

There is, however, one other interesting and pertinent point raised in the submission of the parties that merits consideration by this court. It is whether this court has jurisdiction to change native customary law in order to be in abreast with the changing of time and the reality of the situation so as to avoid injustice, unreasonableness and oppression.

In this regard our attention is also drawn to art 121 of the Federal Constitution which provides, inter alia, that 'the High Courts and inferior courts shall have such jurisdiction as may be conferred by or under federal law'.

We are also referred to Items 2(a)–(b) of List II (State List) of the Ninth Schedule of the Federal Constitution and Item 13 of List IIA (Supplement to State List for States of Sabah and Sarawak) read with articles 74(2) and 95B(1)(a) of the same. By virtue of these provisions, only the State Legislature of Sarawak can legislate on (a) Native Reservations and Land Tenure, and (b) Native Law and Customs, including, inter alia, the determination of native law and customs.

In the light of the above, it is our view that we are unable to consider the appellant's proposition that the court has the power to change native customary law. The power lies with the State Legislature of Sarawak.

[8] In the instant case it is not in dispute that the plaintiffs who belong to the Kayan/Kenyah communities acquired purported NCR over the disputed land in the year 1964. And the plaintiffs were permitted by the Berawan community to settle in the claimed area. And the District Officer, Baram has given tacit approval by a letter dated 27 January 1969 for the plaintiffs to occupy and the said letter, inter alia, reads:

… Kerana sabelom kita pindah ka Long Teran, kita sudah beri chukup terang dengan orang2 Long Jegan dan Penghulu Lejau dan semua dia orang sudah berstuju.

A Oleh sebab tiada ada halangan dan pehak orang yang mempunyie tanah, Penghulu dan lain2 *saya pun bersetuju juga minta tinggal di-sana sahaja.*

[9] Based on the letter it is also the argument of the plaintiffs that the B doctrine of legitimate expectation will assist them to sustain their claim. We must say here that the doctrine of legitimate expectation has everything to do with procedural fairness and when it is raised to anchor a substantive right it only assists to give a fair hearing and proper sanction against authorities by way of damages for loss or damages suffered by the litigant in reliance of the C representation made by the authorities. One or two passages from the learned authors of *De Smith's Judicial Review*, (6th Ed), pp 609 and 612–613 will stand as a useful guide. The relevant passages, inter alia, read as follows:

> Since the early 1970s one of the principles justifying the imposition of both D procedural and substantive protection has been the legitimate expectation. Such an expectation arises where a decision-maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken). It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which E requires regularity, predictability, and certainty in government's dealings with the public …
>
> When considering the procedural, as opposed to substantive aspects of the legitimate expectation, the promise or representation or conduct which creates the F expectation will only require that the person receive a fair hearing. The expectation therefore extends only to the opportunity to make representations or to any other component of a fair hearing, for example, the duty to give reasons. Once the duty to give the hearing has been fulfilled there is not necessarily any further duty to provide the actual substance of the expectation. From the mid 1980s the English courts began to uphold the protection of substantive expectations under limited G conditions …

[10] Support for the above proposition is found in a number of cases. To name a few are as follows:

H (a) in *R v Secretary of State for Transport ex parte Richmond upon Thames London BC* [1994] 1 All ER 577 at p 595, the court stated:

> I consider that the putative distinction between procedural and substantive rights in this context has little (if any) utility: the question is always whether I the discipline of fairness, imposed by the common law, ought to prevent the public authority respondent from acting as it proposes.

(b) in *R v Secretary of State for the Home Department, ex parte Ruddock* [1987] 2 All ER 518, Taylor J said at p 531, that:

> The doctrine of legitimate expectation in essence imposes a duty to act fairly. Whilst most of the cases are concerned, as Lord Roskill said, with a right to be heard, I do not think the doctrine is confined. Indeed, in a case where 'ex hypothesi' there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking given by a minister as to how he will proceed should be kept. Of course such promise or undertaking must not conflict with his statutory duty or his duty, as here, in the exercise of a prerogative power.

(c) in *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 at p 351, Lord Fraser said:

> When a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act and should implement its promise, so long as implementation does not interfere with its statutory duty.

[11] The learned trial judge's findings and decision which the defendants complain of can be gleaned from the judgment which reads as follows:

> … Thus I accepted the submissions that the plaintiffs led by their *ketua kampong* Oyong Anyi Avit has moved or migrated ('bulak' or pindah) to the claimed area in accordance with adat or custom of the Kayan and Kenyah; and with the agreement or permission of the Berawans (Kenyah) of *Kampong* Long Jegan; the community chiefs of the area ie the *penghulu* and councillor of the area; and also with the agreement or permission of the District Officer Baram, the plaintiffs could therefore lawfully acquired NCR over the claimed area (which includes the overlapping area of Lot 3 and Lot 8 therein).

[12] Learned counsel for the third defendant has summarised the issue for consideration for this court as follows:

(a) whether the learned trial judge erred in law and in fact in finding and declaring that the land claimed by the plaintiffs under NCR is 'native customary land?';

(b) whether native customary rights could subsist in the land claimed by the respondents/plaintiffs under NCR upon the said land becoming part of the Bok-Tisam Protected Forest or Reserved Land?;

(c) whether the learned trial judge erred in law and in fact in holding that it would be unjust and unconscionable to the respondents/plaintiffs to allow the plaintiffs to rely upon the protected forest and the provisions of the Forest Ordinance to defeat the plaintiff's claim or to deny them the legitimate expectation that they would be allowed to live, occupy and cultivate the land;

(d) whether the plaintiffs acquired native customary rights over land?; and

(e) whether NCR could subsist in the land claimed under NCR upon it becoming part of forest reserve?

[13] Learned counsel's submission for the plaintiffs on the issue whether the plaintiffs acquired NCR over the land is simple and straightforward. It can be summarised as follows:

(a) the plaintiffs' claim is not founded upon the creation of native customary after 1 January 1958 although they moved into the area in 1964. Their claim is based upon acquisition of temuda rights of Berawans (a sub-race of Kenyahs) who had created and were exercising such rights; and

(b) the correct approach is to ask the questions: (i) whether the Berawans had native customary rights in the subject land; and (ii) whether the plaintiffs lawfully acquired native customary rights from them sometime in 1964. In this regard, it is to be noted that s 5(2)(f) of the Land Code (Cap 81) provided that native customary rights may be acquired by 'any lawful method'. The acquisition of rights in accordance with native custom or adat will fall within this method.

[14] Learned counsel for the plaintiffs had proceeded to justify the trial judges' finding and conclusion in detail in their submission. We find it unnecessary to set out the arguments which we have considered in detail for reasons stated below.

[15] We have read the relevant appeal records and the submission of the parties in detail. We thank the counsel for the comprehensive submission. We do not wish to repeat the same save to deal with the core issues. After having given much consideration to the entire submission of the plaintiffs, we take the view that appeal must be allowed. Our reasons, inter alia, are as follows:

(a) it is well settled in accordance with s 5(1) of the Land Code:

(i) on the issue of NCR as per the instant case, it must be in accordance with the customary law of the community concerned;

(ii) the land must be interior area land; and

(iii) there must be a permit issued under s 10(c) of the Land Code;

(b) In *Madeli bin Salleh v Superintendent of Lands & Surveys, Miri Division & Anor* [2005] 5 MLJ 305, Clement Skinner J (as he then was) sitting in the Court of Appeal had this to say:

> As can be seen, after January 1, 1958, no recognition is given to any native customary rights created after the date by any of the methods mentioned in the s 5 unless a permit to do so under s 10 of the Land Code is obtained.

(c) the claimed land falls under the Bok Tisam Protected Forest ('BTPF') and was so proclaimed under the Lands Ordinance of Sarawak in 1951 which proclamation the learned judge agrees is valid. But goes to say 'that being so, it does not mean the plaintiffs cannot have NCR claim over the area within BTPF'. We do not think so and we are in agreement with submission of learned counsel for the third defendant which can be summarised as follows:

(i) the BTPF comes within the definition of 'Reserved Land'. Section 2 of the Land Code defines 'Reserved Land' as:

(A) reserved to the government under s 38 or under the corresponding section of any Ordinance repealed by this Code;

(B) comprised within a National Park constituted under the National Parks and Nature Reserves Ordinance 1998 or within a Forest Reserve, Protected Forest or Communal Forest constituted under the Forests Ordinance;

(C) occupied otherwise than under a document of title by the federal or state government or by any department or official capacity of either such government; or

(D) otherwise lawfully constituted or declared to be reserved land.

(ii) interior area land is also defined in s 2 of the Land Code as land 'not falling within the definition of Reserved Land, Native Customary Land, Native Area Land or Mixed Zone Land'. By reason of this statutory definition of interior area land, land classified as native customary land cannot be interior area land.

(iii) Therefore, by virtue of s 5(1), NCR land can only be created after 1 January 1958 over the interior area land which cannot include reserved land like the BTPF. Since the claimed area falls within the BTPF, no NCR can be created after 1 January 1958 over the claimed area which is undisputedly reserved land and not interior area land. It is settled law that no NCR can be created over land categorised as reserved land (see (i) *Ara bt Aman & Ors v Superintendent of Lands & Mines, 2nd Division* [1975] 1 MLJ 208; (ii) *Hamit bin Matusin v Superintendent of Lands & Surveys, Miri* [2001] 6 CLJ 813); and

(iv) the plaintiffs never proved that they had obtained any permit under s 10(3) of the Land Code to create NCR over the claimed area. Such a permit can only be issued over interior area land;

(d) we are also of the view that on the factual matrix of the case the learned judge erred when he held that:

A

It must be remembered that Bok Tisam Forest may be declared as BTPF; it is still state land. And it must be remembered that under s 5(2) of the Sarawak Land Code NCR can subsists over state land where no proprietary title has been issued.

B

[16] On this issue we are also in agreement with the submission of learned counsel for the third defendant which can be summarised as follows:

C

(a) For section 5(2) to apply, there must be evidence that NCR (which must be those of the Berawans) in the claimed area within the BTPF subsisted before 1-1-1951 But there is no evidence from the Berawans that they had NCR over any part of the BTPF prior to 1-1-1958.

D

(b) In so far as the respondents are concerned, there is no dispute that they came to the Long Teran by the Batang Tinjar, after 1964 i.e. after Section 5 of the Land Code came into force. Accordingly, the respondents must show that their rights were created in accordance with Sections 5(1) and (2) of the Land Code. The land must not only be untitled State Land but must be Interior Area Land and the Berawans had a permit issued to them under Section 10 of the Land Code.

E

(c) Besides, the prohibitions imposed by Section 33 of the Forests Ordinance, 1934 and by Section 36 (as applicable until it was amended in 1996) of the Forest Ordinance 1953, would have made it illegal for the Berawans and the respondents to create rights within the BTPF by clearing and land therein for farming or cutting timber or taking forest produce without a permit or authority from the Conservator/ Director of Forests. No such permit, licence or authority had been adduced in evidence at the High Court. Therefore, any alleged right created would have been in contravention of the express provisions of the said Forest Ordinances and should not be enforced by declaratory Orders from the Court.

F

G

(d) Accordingly, the learned Judge concluded that even though the land claimed was untitled State Land albeit within the BTPF and therefore, NCR could still subsist, could not be sustained both on law and in fact.

(e) Based on official records there is no evidence that the Berawans had any NCR rights within the BTPF prior to 1964 when they purportedly 'give' their NCR land within the BTPF to the respondents.

H

(f) Further, there is no evidence of any Berawan custom which entitles that community will 'give' away their NCR land (assuming without admitting the Berawans had such alleged NCR) to another totally different community/communities.

I

(g) In any event, the very nature of native customary tenure over land requires the natives to be in continuous occupation of their land and characterised their unique connection and attachment to their ancestral land. Dr Ramy Bulan and Amy Lockyear in their book Legal Perspectives on Native Customary Land Rights in Sarawak, wrote:

> 'The land tenure customs of the Kelabit, Iban and Penan are an integral part of their community structure … The customs underpin the native occupation of their lands, their territorial domains and their connection to their ancestral land.'

[17] The defendants also complain that it was clearly wrong for the learned judge to invoke the jurisprudence of legitimate expectation to provide relief that too to recognise NCR rights on the basis that the state has consented to the plaintiffs occupying the disputed land. That part of the judgment, inter alia, reads as follows:

> In this case the facts clearly established and support the plaintiffs' contentions of having legitimate expectation that they shall be allowed to continue to leave, occupy, use and cultivate the land in the claimed area including the overlapping area of Lot 3 and Lot 8 therein.

[18] And learned counsel for the third defendant on this issue submits as follows:

> Since the Respondents had not established even on a balance of probability that the Berawans (a sub group of the Kenyahs race) had NCR over the claimed area and that the respondents only moved into the claimed area after the meeting held on 15-02-1964, and the said claimed area was either Reserved Land or not Interior Area Land; no NCR could have been created after 1-1-1958 without a permit issued under Section 10(3) of the Land Code. On the basis of these undisputed facts, the respondents could not have any legitimate expectation that 'legitimate expectation 'to be issued a document of title in respect of the said native customary land' as pleaded in paragraph 8(a) of the Re-Amended Statement of Claim.

[19] Learned counsel for the plaintiffs asserts that the doctrine of estoppels and/or legitimate expectation is applicable in the instant case and submits as follows:

> The learned trial Judge found that the doctrine of estoppels was available to answer the Defendant's defence. He held that it would be unjust, inequitable and unconscionable to allow the Defendants to rely upon the constitution of the Bok-Tisam Protected Forest to defeat the plaintiffs' claim and to deny them the right and legitimate expectation of being allowed to live in occupy and cultivate the land.
>
> In coming to the above conclusion, the learned trial Judge accepted the Plaintiffs' submission founded on a mass of undisputed evidence which established:
>
> - Their migration to the land claimed by them in accordance with the adat or 'bulak' was with the tacit approval/agreement of the District Officer Baram;
> - They had paid rates for amenities provided by local council;

- They had received agricultural subsidies for the planting of pepper, rubber and cocoa from the authorities who had also built a primary school, a health clinic and piped water supply for the area;
- When the plaintiffs' longhouse was destroyed in a fire, the defendants had rendered assistance for building of the present longhouse;
- The natural Resources and Environmental Board (BREB) accepted and approved the recommendation in the EIA Report that the plaintiffs be allowed to continue to live and form within the claimed area and which contained the recommendation 'To the local farmers who have been forming and living in the area for generations, and who are in genuine need of land these is a moral responsibility on the part of the Government to ensure that they have sufficient land to cultivate …'
- The 2nd Respondent has opted to sign the Letter of Undertaking (Exh. P18) to comply with conditions set by NREB or recommendations made by EIA Report.

In coming to the above conclusion the learned trial Judge sought guidance from various case law authorities, namely:

Sia Siew Hong v Lim Gin Chian [1995] 3 MLJ 141

Chor Phaik Har v Choong Lye Hock Estates Sdn Bhd [1996] 4 CLJ 141

Boo Are Ngor v Chua Mee Liang [2008] 4 CLJ 533.

[20] We must say the doctrine of legitimate expectation in the recent years is being widely used in cases other than purely relating to administrative law. For example, in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 Lord Denning MR was of the view that the ambit of natural justice extended not merely to protect right but any legitimate expectation of which it would not be fair to deprive a person without hearing what he has to say. In *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director General of Trade Unions & Others* [1990] 3 MLJ 231, Justice Edgar Joseph Jr traced the concept of legitimate expectation and opined that it has been evolved by the court to assist in identifying interests which do not constitute rights in the strict sense but nevertheless deserve legal recognition in the context of legal expectation. His Lordship asserted that it was in *Schmidt* that Lord Denning first applied this concept which was recognised by our Supreme Court in JP Berthelesen (see *JP Berthelesen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 233). In *Union of India v Hindustan Development Corp* AIR 1994 SC 988, the Indian Supreme Court recognised the jurisprudence that the doctrine of 'legitimate expectation' imposes in essence a duty on public authority to act fairly by taking into consideration all relevant factors relating to 'legitimate expectation'. In *Ghaziabad Development Authority v Delhi Auto & General Finance Pvt Ltd* [1994] 4 SCC 42, the Indian Supreme Court was of the view that the plea of legitimate expectation relates to procedural fairness in

decision-making and forms part of the rule of non-arbitrariness, and it is not meant to confer an independent right enforceable by itself.

[21] What is important to note in all the above cases is simply that the doctrine of legitimate expectation cannot create a right when such right does not exist but may give some form of limited relief to the litigant if there is some unfairness or conduct which led the litigant to suffer inconvenience or damages.

[22] To entail the litigant to obtain the relief, it must be pleaded in the right perspective and cannot be claimed based on a purported right which the law does not recognise under s 5 of the SLC. The fact that the government authorities have conducted themselves in a manner to support the plaintiffs' claim cannot be a basis in law to invoke the jurisprudence relating to legitimate expectation to assert a right which the law does not recognise. More so when s 44 of the SLC specifically states:

> No person shall acquire any right or title against the Government by virtue of any adverse possession, unlawful occupation or occupation under temporary licence, and no right or title shall be acquired against the Government, such right or title as may be lawfully granted under this Code.

[23] Support for the above proposition is also found in a number of cases. In *North East Plantations Sdn Bhd v District Land Administrator & Anor* [2010] MLJU 413; [2011] 2 CLJ 392, Abu Samah JCA, delivering the majority judgment of the Court of Appeal, held:

> In our judgment, legitimate expectation cannot override the express statutory provisions of the Code.

(See *Sidek bin Haji Muhamad & 461 Ors v The Government of the State of Perak & Ors* [1982] 1 MLJ 313; [1982] CLJ (Rep) 321; *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309; [2008] 4 CLJ 538).

[24] For reasons stated above, we take the view that all the three appeals must be allowed with costs. The order of the High Court must be set aside. The plaintiffs to pay each the defendant costs in the sum of RM5,000.

[25] We hereby order so.

Appeals allowed with costs.

Reported by Afiq Mohamad Noor